

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-852**

BURTON A. LIBRACH,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION
WILLIAM H. WEBSTER, DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
and
GRIFFIN B. BELL, ATTORNEY GENERAL OF
THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

RONALD L. ROTHMAN
AND ASSOCIATES, P.C.
RONALD L. ROTHMAN
8008 Carondelet
Clayton, Missouri 63105
Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	11
1. The proceedings below raise an important question concerning the judicial process in Freedom of Information Act cases	11
2. The decision of the Court of Appeals has allowed the agencies to unlawfully withhold documents by use of exemptions in 5 U.S.C. §552(b) which should have been provided to petitioner pursuant to the Jencks Act, 18 U.S.C. §3500 and the constitutional requirements set forth in Brady v. Maryland in his criminal trials	14
3. This case presents an important question of Federal Statutory Law not decided by this Court or any Court of Appeals.	17
4. The decision by the Court of Appeals in this case is in conflict with the law of other circuits, and not in accordance with the law of the Eighth Circuit	19

5. The decision by the Eighth Circuit permits the District Court to unlawfully evade its mandate in petitioner's first appeal.	21
Conclusion.	22
Appendix A.	A-1
Appendix B.	B-1
Appendix C.	C-1
Appendix D.	D-1
Appendix E.	E-1
Appendix F.	F-1
Appendix G.	G-1
Appendix H.	H-1
Appendix I.	I-1

TABLE OF CASES

Brady v. Maryland, 373 U.S. 83 (1963)	2, 15
Committee on Masonic Homes of the R. W. Grand Lodge and A.M. of Pennsylvania v. National Labor Relations Board, 556 F.2d 214 (3rd Cir. 1977).	18
Cox v. United States Department of Justice, 576 F.2d 1302 (8th Cir. 1978).	19, 20

Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973) cert. denied 415 U.S. 877 (1974)	11
Department of the Air Force v. Rose, 425 U.S. 352 (1976).	20
EPA v. Mink, 410 U.S. 73 (1973)	14, 19
Giglio v. United States, 405 U.S. 104 (1972)	15
Goldberg v. Kelly, 397 U.S. 254 (1970)	12
Grunnis v. Ordean, 234 U.S. 385 (1914)	12
Kanter v. IRS, 433 F.Supp. 812, 823 (N.D. Ill. 1977)	13
Librach v. FBI, et al., Slip Op. No. 78-1671 (8th Cir., October 19, 1978)	21, 22
Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).	18, 19
State of North Dakota v. Andrus, Slip Op. No. 78-1075 (8th Cir., August 9, 1978).	18
United States of America v. Librach, 520 F.2d 550 (8th Cir. 1975)	4, 13
Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1978) cert. denied 415 U.S. 977 (1974)	11

STATUTES CITED

5 U.S.C. §552 et seq. . 3, 5, 15, 16, 17, 18	
18 U.S.C. §3500	15
28 U.S.C. Federal Rules Civil Procedure, Rule 8(c)	18

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.....

BURTON A. LIBRACH,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION
WILLIAM H. WEBSTER, DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
and
GRIFFIN B. BELL, ATTORNEY GENERAL OF
THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

Burton A. Librach, petitioner,
respectfully prays that a Writ of Certiorari

issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 1, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 1, 1978. This petition was filed within 60 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a Plaintiff in a Freedom of Information Act suit is denied due process of law when he is not given an opportunity to respond to affidavits and oral, *ex parte* representations made off the record by defendant agencies justifying their claimed exemptions.

2. Whether an agency may use the exemptions of 5 U.S.C. §552(b) to withhold documents which should have been released pursuant to 18 U.S.C. §3500 and the doctrine of *Brady v. Maryland* to a defendant in a criminal case.

3. Whether exemptions provided for in 5 U.S.C. 552(b) of the Freedom of Information Act are affirmative defenses to be pleaded and proved by a defending agency, and whether

the agency waives its rights to claim exemptions by its failure to plead them as required by Rule 8(c) of the Federal Rules of Civil Procedure.

4. Whether the agencies failed to meet their statutory burden of proving exemptions they claimed.

5. Whether the Court of Appeals erred in failing to grant petitioner's Petition for a Writ of Mandamus.

6. Whether the Court of Appeals should have balanced the public's interest in disclosure of the requested documents versus the individual interest in privacy in considering the government's claim of (b)(7)(c) as an exemption.

7. Whether a plaintiff in a Freedom of Information Act suit should be entitled to a summary judgment when the defendant agencies fail to plead claimed exemptions and fail to respond to a Motion for Summary Judgment by way of counteraffidavits or by responding that such affidavits may not be produced as provided by Rule 56(f).

STATEMENT OF THE CASE

By letter dated March 13, 1978, petitioner requested documents and information pursuant to 5 U.S.C. §552, the Freedom of Information Act. Petitioner's request was directed to the Federal Bureau of Investigation, the Department of Justice, and William H. Webster and Griffin B. Bell as the respective heads of these agencies. The information requested pertained to petitioner's prosecution and

conviction under 18 U.S.C. §1001.

Petitioner requested these documents to develop evidence of prosecutorial misconduct in securing his conviction in order to present this evidence to the United States District Court for the Eastern District of Missouri in his Motion for a New Trial. The documents obtained through petitioner's Freedom of Information Act request indicated the following acts of prosecutorial misconduct which petitioner alleged in his Motion for New Trial filed November 6, 1978. (*United States of America v. Librach*, Cr. 74-199) (1) Suppression of evidence exculpatory to defendant. (2) Suppression of evidence which could have been used as a basis for impeaching two key government witnesses. (3) Failure to disclose a grant of informal immunity to a key government witness, Timothy David Person. (4) Subornation of perjury by the United States Attorney. (5) Destroying or purging documents in the file of the United States Attorney. Petitioner was forced to file that Motion on November 6, 1978, because of the two year Statute of Limitations of Rule 33 of the Federal Rules of Criminal Procedure, requiring that Motions for New Trials for newly discovered evidence be made within two years of the date of final judgment. Petitioner made known to the agencies that the Statute of Limitations applicable to his situation made time of the essence, and requested the agencies to process his request within the time limits prescribed by the Act.

The defendant agencies failed to furnish the requested documents within the applicable

time and Petitioner took his administrative appeal to the Assistant Attorney General on April 24, 1978. On May 5, 1978, and again on May 15, 1978, the Federal Bureau of Investigation and the Department of Justice respectively, informed petitioner they were unable to respond to his appeal within the time limits prescribed by the Act, and as such, advised him that he had the right to seek judicial review of his request in an appropriate United States District Court.

On May 18, 1978, petitioner filed suit pursuant to the provisions of 5 U.S.C. §552 in the United States District Court for the Eastern Division of the Eastern District of Missouri, seeking to compel production of the documents he had requested from the Federal Bureau of Investigation and the Department of Justice. On that same date, petitioner filed a Motion with the Court seeking to compel the agencies to provide a detailed and specific justification for any exemptions they were claiming under the Act.

The government filed its Answer to petitioner's Complaint on June 19, 1978. The government's Answer did not raise any of the nine exemptions provided for in 5 U.S.C. 552(b).

On June 30, 1978, Petitioner filed a Motion for Summary Judgment with a supporting Affidavit and Memorandum. In that Motion, petitioner set forth for the Court his need for obtaining the documents as quickly as possible. The government did not respond to this Motion in any form.

The Summary Judgment Motion was heard by the Court on August 7, 1978. On the

government's statement that the documents would be provided in fifteen (15) days, the Court ordered their production within that time and retained jurisdiction of the Motion. This fifteen-day time period passed without any documents being produced by the government, and without any explanation as to why they were not produced. Petitioner was furnished with a copy of the Federal Bureau of Investigation documents on August 24, 1978 and with a copy of the Department of Justice records on August 29, 1978.

After completing a review of the documents, it became apparent to petitioner that certain documents were missing from the file of the Department of Justice. On August 30, 1978, petitioner filed a Motion for Contempt with the Court seeking to have the parties named in that Motion cited for contempt of the Court's August 7, 1978 Order. The Court after a hearing of that Motion, refused to sign the Show Cause Order.

Petitioner subsequently filed on August 31, 1978, a Motion For *in camera* Inspection and Production of Documents. This Motion requested the Court to order the government to turn over all the requested documents to the Court, thus giving it the opportunity to examine the documents *in camera* to determine what additional documents could be provided to petitioner.

The documents were turned over to the Court voluntarily without a Court order, and without any certification of their entirety. The Court reviewed the documents and upheld

every exemption taken by the government without any itemized explanation for upholding the exemptions as to each particular document in its Order of September 13, 1978. (Appendix B). The government also did not file any affidavits justifying their claimed exemptions until September 18, 1978, although it appears that the District Court was provided copies of these affidavits prior to that time.¹ Petitioner then, was not given any opportunity to respond to these affidavits (the Federal Bureau of Investigation affidavits) as they were not mailed to him until September 18, five (5) days after the District Court's Order upholding the exemptions and the day he filed his Notice of Appeal. Burkhalter's affidavit, was not mailed to petitioner until September 20, 1978. The affidavit of the U. S. Marshal's service was not provided until October 12, 1978, after petitioner had filed his brief in the Court of Appeals. (Apparently, the Affidavit of Burkhalter and the Affidavit of the Marshal's Service were not before the District Court in its first *in camera* inspection. Also, the Marshal's Service Affidavit does not appear on the record as having been filed, although apparently it was.)

1. The affidavits are those of Special Agent Wood of the FBI, one dated August 16, 1976 (Appendix C) and one dated September 8, 1978 (Appendix D). The Affidavit of Don R. Burkhalter, of the Executive Office for U. S. Attorneys responding for the U. S. Attorney's Office of the Eastern District of Missouri, filed September 21, 1978 (Appendix E). The Affidavit of the U. S. Marshal's Service by Lawrence Fisher dated October 6, 1978 (Appendix F).

It must also be noted that the Affidavit of Burkhalter, stated that petitioner had received the entire file of the U. S. Attorney's Office for the Eastern District of Missouri. This was in accordance with prior statements on the record by the government's attorneys that the entire Department of Justice file, particularly the Eastern District's file had been given to petitioner. However, on September 27, 1978, two days before he filed his brief, petitioner received additional documents from the Criminal Division of the Department of Justice, not previously received. The letter accompanying those documents noted that these documents originated in the U. S. Attorney's office for the Eastern District of Missouri. (Appendix G). It also stated, that additional documents were being referred to the Executive Office for U. S. Attorneys, that office being the Division of the Department of Justice which responds for the various U. S. Attorney's offices nationwide in a Freedom of Information Act suit, for possible release to petitioner. As that office had already responded to petitioner's request, stating he had received the entire Justice Department file, i.e., the file of the U. S. Attorney for the Eastern District of Missouri, it would seem highly unusual that petitioner would receive additional documents which should have been with the file he had already received. Also, despite statements from the government that he has received everything, there are still documents outstanding, which clearly should have been in the Eastern District's file, and were not. Thus, even at this advanced stage of this case, petitioner still cannot be sure that the government has responded fully to his initial Freedom of Information Act

request.

Petitioner appealed the District Court's ruling on September 18, 1978. The Court of Appeals granted petitioner's Motion for an Expedited Hearing of his case, setting the case for oral argument on October 17, 1978. On October 19, 1978, after oral argument, the Court of Appeals issued its mandate, vacating the September 13, 1978 Order of the District Court, and remanding the case with specific instructions. (Appendix H). Noting that petitioner faced a time limitation, the Court ordered the proceedings on remand to be expedited, directing the District Court to file a new order complying with its mandate by October 31, 1978.

The District Court filed its new Order October 27, 1978. (Appendix I). While this Order complied in certain respects to the mandate of the Court of Appeals, it did not comply in full with that mandate. Specifically, the District Court stated that the file of the United States Marshal's Service was not before the Court, but after giving a brief description of the documents contained in that file, (a description given orally, *ex parte* and not on the record by the government), the District Court upheld the exemption of that file by the government. The Marshal's Service file contains documents relating to the witness protection of Robert Fowler, a key government witness at both of petitioner's criminal trials. Petitioner requested this file in order to discover exactly how much money Robert Fowler received while in that program. This file was clearly encompassed within the petitioner's initial request and was encompassed within the mandate of the Court

of Appeals as documents which the District Court was required to review *in camera*.

On October 30, 1978, petitioner filed a Petition for a Writ of Madamus with the Eighth Circuit, requesting that the District Court be ordered to comply with the Eighth Circuit's mandate of October 19, 1978. The Court of Appeals apparently chose to treat this petition as an appeal on the merits, and it affirmed the District Court's Order on November 1, 1978. (Appendix A).

Thus, at this point in the proceeding, no court, either the District Court, or the Court of Appeals has reviewed the documents in the Marshal's Service file. As is apparent from the District Court's October 27, Order, some of the basis for withholding the Marshal's Service file were made by oral *ex parte* representations by the government not on the record. This is clear as some of these reasons are not contained in the Affidavit prepared by Lawrence Fisher on behalf of the Marshal's Service. (Appendix F). Again, petitioner was not given any opportunity to challenge these representations by the agencies either in open court, or by way of counteraffidavits.

DECISION BELOW

The Court of Appeals has in essence, affirmed the Order of the District Court, both in terms of its failure to review the documents in the Marshal's Service file, and its rationale for upholding the exemptions taken as to other documents reviewed *in camera*.

REASONS FOR GRANTING THE WRIT

1. The proceedings below raise an important question concerning the judicial process in Freedom of Information Act cases.

The courts have noted that Freedom of Information Act cases (hereinafter FOIA) create an anomaly in our traditional adversary court system. Plaintiffs seeking to compel disclosure of materials contained in agency files can neither dispute nor argue against the characterization of the documents by the agencies. The plaintiff then, is unable to assist the trial court in reaching any conclusion concerning the status of documents sought. See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) cert. denied 415 U.S. 977 (1974) and *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973) cert. denied 415 U.S. 977 (1974).

In order to redress this peculiarity of FOIA cases, the courts have developed a system requiring agencies in FOIA cases to provide a detailed index and itemization of the documents sought, and to specify in detail which documents or parts of documents they are exempting and reasons for the exemptions. See *Vaughn v. Rosen*, *supra.*, 484 F.2d at 826-828 and *Cuneo v. Schlesinger*, *supra.*, 484 F.2d at 1091-1092. The Court in *Vaughn* justified this procedure as being necessary (1) to redress the severe handicap that plaintiffs face in arguing the legal status of documents they have never seen, (2) to relieve the intolerable burden that would

otherwise be placed on the courts, and (3) to counteract the tendency of the government to claim the broadest possible privilege for the largest amount of materials, 484 F.2d at 825-826.

The clear intent of the courts in requiring agencies in FOIA cases to provide the detailed itemization and index was to afford a plaintiff his due process right to present and argue his position on the status of the documents to the trial court. Obviously, once a plaintiff has in hand the detailed index listing the documents and specifying why certain documents are exempt, he may then present to the District Court concise legal and factual arguments as to why the documents should be released. Clearly, a plaintiff may have within his possession information the trial court would not be aware of which would lead the trial court to conclude that documents being withheld should be released.

This Court has stated repeatedly that "the fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The proceedings in this case have denied petitioner his right to present his position on the government's claimed exemptions. First, petitioner was not given any detailed index of documents by the government. It was only upon remand that the District Court was ordered to specify in its Order why the documents were exempt, and which exemption applied to a particular document. Furthermore, it is clear that on remand, the

government presented to the District Court certain rationales for withholding the U. S. Marshal's Service file which were not stated in the Affidavit petitioner was given. (Appendix I). If the government wished to present additional reasons for withholding the documents, it was clearly given the opportunity to do so by filing additional affidavits on the record by October 24, but it did not.

Petitioner is forced in this case to rely on the good faith of the agencies in accurately describing the contents of the Marshal's Service file. Petitioner would note that his conviction after his first trial was reversed because of prosecutorial misconduct, specifically the failure by the United States Attorney to tell him that Robert Fowler was in the witness protection program and was receiving payments from the government. *U.S. v. Librach*, 520 F.2d 550 (8th Cir. 1975). Petitioner has now filed a Motion for a New Trial alleging additional acts of deliberate prosecutorial misconduct. One court has recently stated that such allegations may "... provide the defendant with a motive to be unduly secretive about the content of their files." *Kanter v. IRS*, 433 F.Supp. 812, 823 (N.D. Ill. 1977).

Petitioner clearly had a due process right to present his position to the District Court on these arguments presented by the government, yet he was not given an opportunity to respond. Instead, he is presented with a *fait accompli* where the government either during the District Court's second *in camera* inspection or at some time prior to it, presented orally and *ex parte*, reasons not on the record for withholding

documents requested by petitioner. Petitioner learned of these reasons only upon receipt of the District Court's October 27, Order.

In essence, petitioner's position in this:

(1) The intent of the courts in requiring agencies in FOIA cases to provide a detailed index and itemization of the documents specifying the general nature of each document withheld and the exemption used to withhold it, is to provide a plaintiff the opportunity to effectively present his position on the status of the documents, i.e., to be heard.

(2) The government must if it wishes to withhold documents, give its reasons for doing so on the record, either by way of detailed affidavits to the court and the plaintiff, or by testimony given in open court. See *EPA v. Mink*, 410 U.S. 73, 93 (1973).

(3) A proceeding allowing the government to give its reasons or additional reasons beyond what it has already given on the record in an *ex parte* proceeding, denies petitioner his due process right to be heard and present his position to the court in an adversarial context.

For these reasons, petitioner believes the court should grant his request for a Writ of Certiorari.

2. The decision of the Court of appeals has allowed the agencies to unlawfully

withhold documents by use of exemptions in 5 U.S.C. §522(b) which should have been provided to petitioner pursuant to the Jencks Act, 18 U.S.C. §3500 and the constitutional requirements set forth in *Brady v. Maryland* in his criminal trials.

The FOIA provides but one method of securing information contained in government files. Where a person is the subject of a criminal prosecution, this Court and Congress have provided additional methods of obtaining information. In *Brady v. Maryland*, 373 U.S. 83 (1963) this court held that the constitution required the government to provide favorable evidence to a defendant in a criminal case. The court defined favorable evidence as evidence which was material to either the guilt or punishment of a defendant. *Id.* at 87. The court further defined this standard in *Giglio v. United States*, 405 U.S. 104 (1972) by requiring that evidence tending to impeach the credibility of a government witness must be provided. The other mechanism for obtaining evidence or documents from the government is 18 U.S.C. §3500 which provides that statements given by government witnesses must be provided to a defendant after they have testified at trial.

Petitioner has requested from the government in his FOIA suit documents concerning his criminal prosecution. He has already obtained seven documents which were not provided to him in his second trial, even though he requested those documents by appropriate pretrial motions. Petitioner also has knowledge of other documents which

he has not received as a result of (via) his FOIA request which should be producible under the standards of *Brady* and *Giglio*. Specifically, documents concerning witness immunity request and grants of formal immunity to certain witnesses (Sam Seigel and Ronald Heller) who testified at his trial were not in the file petitioner received from the United States Attorney's Office for the Eastern District of Missouri. Petitioner should also be entitled to the actual vouchers and receipts for payments made to Robert Fowler, these documents being in the U. S. Marshal's Service file. Beyond these documents, petitioner would also be entitled to any statements made by any government witness who testified at his trial, or if the person did not testify, any statement which was exculpatory to petitioner.

Petitioner would submit that the agencies have made improper use of the exemptions provided for in the FOIA to withhold documents he is entitled to by constitutional standards or by the Jencks Act. It is more than clear that Congress did not intend for the exemptions provided for in subsection (b) to be used as a vehicle to withhold documents a criminal defendant was entitled to under *Brady* or under the Jencks Act. If petitioner was entitled to these documents at his criminal trials, he is entitled to them now notwithstanding the exemptions of 5 U.S.C. §552(b). In short, the agencies may not use the exemptions of the FOIA to withhold documents they are otherwise required to provide to a criminal defendant. Petitioner believes this reason warrants review by this Court, and therefore asks that his Writ of Certiorari be granted.

3. This case presents an important question of Federal Statutory Law not decided by this Court or any Court of Appeals.

The instant case involves a unique factual situation giving rise to an important question of Federal Statutory Law, namely:

Whether exemptions provided for in 5 U.S.C. §552 (b) are affirmative defenses which must be pled and proved by defendant agencies.

Petitioner's research on this question has not discovered any case deciding this question. Obviously, the reason for the dearth of authority on this question is simply because defendant agencies normally set out in their answer what exemptions they are relying on.

However, in this case, the agencies have not pled any exemptions of subsection (b) in their answer. They have instead, relied on exemptions taken in the administrative process in reviewing the documents requested by petitioner. Petitioner raised this question in his appeal to the Eighth Circuit, but that Court decided the appeal on the narrower grounds that the record was inadequate for purposes of appellate review, not ruling on this point.

Petitioner believes the clear intent of Congress in putting the burden on the agency to sustain its claim of exemptions was to make the exemptions of subsection (b) affirmative defenses for the agencies to plead and prove. 5 U.S.C. 552 (a)(4)(B).

Further, the courts have been uniform in holding that a defendant agency is encumbered with the burden of justifying its refusal to disclose requested documents. See *Committee on Masonic Homes of the R. W. Grand Lodge and A.M. of Pennsylvania v. National Labor Relations Board*, 56 F.2d 214 (3rd Cir. 1977), *Mead Data Central Inc. v. United States Department of the Air Force*, 556 F.2d 242 (D.C. Cir. 1977), and *State of North Dakota v. Andrus*, Slip. Op. No. 78-1015 (8th Cir., August 9, 1978) at 4.

It would also seem that the exemptions of subsection (b) would clearly fall within the language of Rule 8(c) of the Federal Rules of Civil Procedure, requiring a party to set forth affirmatively ... "any other matter constituting an avoidance or affirmative defense." The exemptions of subsection (b) would certainly be an avoidance, as the agencies must show that one or more of the Act's nine exemptions apply to requested documents before the documents can be withheld. *State of North Dakota v. Andrus*, *supra*. See also *EPA v. Mink*, 410 U.S. 73, 80 (1973).

Petitioner's claim is essentially quite simple, being that the nine exemptions provided in 552 (b) are affirmative defenses which must be pleaded by defendant agencies or waived by them. As this question has not been decided by any Court of Appeals or by this Court, petitioner request this Court to grant his petition for a Writ of Certiorari to decide this question.

4. The decision by the Court of Appeals in this case is in conflict with the law of other circuits, and not in accordance with the law of the Eighth Circuit.

The Courts of Appeals have been consistent in holding defendant agencies to a stringent standard of proof in meeting their statutory burden of withholding requested documents. This clearly is in accordance with the intent of the Act which favors disclosure. See *EPA v. Mink*, *supra*, 410 U.S. at 80.

The usual statement from the Courts concerning the standard of proof the agency must meet is this:

An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat rather than further, the purposes of the FOIA. *Mead Data Central Inc. v. United States Department of the Air Force*, *supra*, 566 F.2d at 258. See also *Cox v. United States Department of Justice*, 576 F.2d 1302, 1310-12 (8th Cir. 1978).

Petitioner would submit that this is exactly what the Eighth Circuit has allowed the agencies to do in this case. A close examination of the affidavits provided will portray that for the most part, they contain mere conclusory statements about the

exemptions taken. The September 8 Affidavit by Special Agent Wood basically contains a history of the processing of petitioner's FOIA request. Special Agent Wood's August 16 Affidavit contains some reasons for withholding exempted documents (some already overruled by the District Court on remand) but does not go much beyond relying on the bare bones of the statutory exemptions themselves. The Affidavit by Lawrence Fisher of the Marshal's Service, does not contain any reasons for withholding the documents.

This type of conclusory justification clearly is not what the Courts of Appeals and this Court have had in mind when declaring that defending agencies have the burden of justifying any exemptions. See *Department of the Air Force v. Rose*, 425 U. S. 352 (1976). The Courts have also been quick to note that conclusory affidavits do not aid the Court for purposes of reviewing agency action. See *Cox v. United States Department of Justice*, *supra*, 576 F.2d at 130 stating: "[o]ur review is further hindered by the general and conclusory nature of the affidavits submitted by the government to support its position."

The affidavits submitted by the agencies in this case, simply have not matched the required standard of the Courts of specific and detailed proof that exemptions taken are justified. The decision by the Eighth Circuit is not in accordance with the law of this Circuit, or with any of the other Circuits which have decided this question. Petitioner believes this Court should now set some standards for what will suffice as sufficient proof to justify taken exemptions. Further, as the decision by the Eighth Circuit upholding the agencies' exemptions in

this case is not in accordance with the present law, petitioner would ask the Court to grant this petition for purposes of reviewing the Eighth Circuit's decision.

5. The decision by the Eighth Circuit permits the District Court to unlawfully evade its mandate in petitioner's first appeal.

In its opinion deciding petitioner's first appeal, the Court of Appeals required that the District Court "file an order identifying for each withheld document found exempt from disclosure: the type of document in general terms the date and page number, the exemptions the agencies claimed for the documents or segments and the exemption relied upon by the District Court in authorizing nondisclosure." *Librach v. FBI, et al.*, Slip. Op. No. 78-1671 (8th Cir., October 19, 1978 at 4. The District Court filed its Order to comply with the Court's mandate on October 27, 1978.

Clearly, the intent of the Court of Appeals was that the District Court review all the disputed documents. However, this was not done. The District Court clearly states in its October 27, Order that the documents of the U. S. Marshal's Service are not before the Court. These documents were part of the documents initially requested by petitioner. Further, as the Marshal's Service is a division of the Department of Justice, the District Court was required by the mandate of the Court of appeals to review those documents *in camera* and make a determination concerning their disclosure.

Petitioner's Petition for a Writ of Mandamus to the Eighth Circuit was specifically addressed to the issue of requiring the District Court to comply with that Court's mandate. The Court of Appeals as noted previously, apparently chose to treat that petition as an appeal on the merits as it affirmed the Order of the District Court, deciding the merits of the case. The Court of Appeals also stated in its opinion deciding the mandamus petition that the District Court has sufficiently complied with its mandate of October 19. *Librach v. FBI, et al., supra* at 3.

Petitioner would suggest however, that in this case, sufficient compliance is not compliance in fact. The Court of Appeals clearly did not intend to amend or modify its prior mandate of October 19. With its November 3 opinion, it simply chose to decide the case on the merits. The Court of Appeals then, has improperly permitted the District Court to escape complying with its Order in full. This amounts to nothing less than a clear deviation from the normal course of judicial proceedings and requires that this Court exercise its general supervisory powers in the administration of justice to correct this anomaly. For this reason, petitioner requests this Court to grant his Petition for Certiorari.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit. It is also respectfully submitted that this Court should grant petitioner a Writ of

Mandamus directed to the United States District Court for the Eastern District of Missouri, directing that Court to order the documents contained in the file of the U. S. Marshal's Service be provided to petitioner forthwith, or in the alternative directing that Court to review the documents in the Marshal's Service file *in camera* and give detailed justifications for withholding any of those documents and for such other and further relief which in the premises may be just and proper.

RONALD L. ROTHMAN AND
ASSOCIATES, P.C.

RONALD L. ROTHMAN
8008 Carondelet
Clayton, Missouri 63105
(314) 862-6000
Attorneys for Petitioner

APPENDIX

— A-1 —

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

NO. 78-1671

Burton A. Librach,)	
Appellant,	)	Appeal from the
	)	United States Dis-
v.	)	trict Court for
	)	the Eastern District
Federal Bureau of	)	of Missouri.
Investigation, et al.)	
Appellees)	

Filed: November 3, 1978

Before ROSS and McMILLIAN, Circuit Judges,
and LARSON,* Senior District Judge.

PER CURIAM.

This matter is before the court upon
the petition of Burton A. Librach for a

*The Honorable Earl R. Larson, Senior
United States District Judge for the Dis-
trict of Minnesota, sitting by designation.

writ of mandamus to compel the Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, to order the release and disclosure of certain files requested by Librach under the Freedom of Information Act (FOIA), 5 U.S.C. §552.

On October 19, 1978, we remanded this action to the district judge for an explanation in greater detail of his ruling of September 13, 1978, holding portions of the requested documents exempt from disclosure.

Judge Wangelin has issued a revised order identifying (1) the documents in terms of the agencies which furnished them, (2) the portions to be released by page number, (3) the exemptions applicable to the withheld material, and (4) the reasons for upholding those exemptions.

With respect to the FBI materials, the district court denied access only to portions of investigatory records containing the names of persons who were investigated for suspected criminal activity or who are otherwise mentioned therein, but who were not indicted or tried. We find that the court correctly applied exemption 5 U.S.C. §552 (b) (7) (C) to protect the named persons from a clearly unwarranted invasion of personal privacy. The same names were properly withheld from the materials provided by the Department of Justice.

The district court properly withheld a medical file for which the Department of Justice claimed exemption 5 U.S.C. §552 (b)(6), which exempts " * * * medical files

* * * the disclosure of which would constitute a clearly unwarranted invasion of privacy."

The court also upheld, under exemption 5 U.S.C. §552 (b)(3), comments on grand jury testimony and a tax return restricted from disclosure by FED R. CRIM. P. 6(e) and 26 U.S.C. §6103. We find no error in Judge Wangelin's determination with respect to these documents.

The district court applied exemptions 5 U.S.C. §552 (b)(3), (7)(C) and (E) to materials in the possession of the United States Marshal's Service. The records pertain to the relocation of a witness under the Department of Justice Witness Security Program. The court agreed with the government's contention that to release these materials would jeopardize the effectiveness of the Witness Security Program and would invade the personal privacy of the witness. We agree with Judge Wangelin's conclusions.

The district court has sufficiently complied with the ruling by this court of October 19, 1978. The petition of Burton A. Librach for a writ of mandamus is therefore denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Burton A. Librach,)
Plaintiff,)
v.) No. 78-505 C (2)
Federal Bureau of)
Investigation, et al.)
Defendants.)

MEMORANDUM

The Court has examined the documents sealed in this envelope and finds that the deletions made and other documents refused are within the purview of the exemptions provided for in Chapter 5, U.S.C.A. §552 and particularly the exemptions specified in (B) (6) (7) (C) and (D).

Affidavits from a duly constituted representative of the Federal Bureau of Investigation and the Department of Justice are to be furnished by the government.

/s/H.Kenneth Wangelin
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Burton A. Librach,)
Plaintiff)
v.) Civil Action No.
Federal Bureau of) 78-0505-C
Investigation, et al.)
Defendants.)

AFFIDAVIT OF SPECIAL AGENT
MARTIN WOOD

I, Martin Wood, being duly sworn, hereby depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Branch, Records Management Division of the FBI, Washington, D. C. Due to the nature of my official duties, I am familiar with the procedures followed in processing FOIPA requests received at FBI Headquarters (FBIHQ), and specifically with the processing of plaintiff's request.

(2) In response to the request of United States District Judge H. Kenneth Wangelin, I am attaching hereto, true and exact copies of all of the documents

which were processed by the FBI in response to plaintiff's FOIPA request. The documents are in a sealed envelope, marked with the notation that it is to be opened only by United States District Court Judge H. Kenneth Wangelin. Included with the copies of the documents are copies of the FBI's letters of June 30, and July 28, 1978, with which the excised copies of the documents were furnished to plaintiff. Also included are five pages of inventory worksheets, on which the documents were listed as they were processed, with the number of pages contained in each document, the number of pages released to plaintiff from each document, and the exemptions claimed for material withheld.

(3) The copies of documents being furnished the Court are from FBIHQ file 46-62969, of which the plaintiff is one of the subjects, and comprise copies of all of the documents located in that file. Material which was withheld from the plaintiff is bracketed or otherwise indicated in red, and the exemption claimed is indicated, also in red, immediately adjacent thereto.

(4) Aside from file 46-62969, mentioned above, only two references to the plaintiff could be found in the General Indices to the FIB's Central Records System. These two references are located in file 44-64134, and were provided to the plaintiff previously under another FOIPA request wherein plaintiff was acting as attorney for the requester. These two references were not furnished to plaintiff as part of his current FOIPA request, nor are they being furnished to the Court at this time, but can be made available should either the Court or the plaintiff so desire.

(5) As our letter of June 30, 1978, advised the plaintiff, only Subsections (b)(7)(C) and (b)(7)(D) of Title 5, United States Code, Section 552, were relied on in denying material to the plaintiff. Subsection (b)(7)(C) alone was used to protect the privacy of other individuals who were mentioned in the file, but who were not indicted or brought to trial; such mention could be construed by members of the public as an indication that the individual was suspected of criminal activity, thus causing what we think would be an unwarranted invasion of that individual's privacy. Subsection (b)(7)(C) was also used alone to withhold the names of FBI Special Agents who participated in the investigation. We think that the need to protect our employees from unnecessary questioning and intrusion in their private lives in most cases outweighs the public need for those names. FBI agents during their investigation come in contact with individuals from all levels of our society. They are required to conduct searches and make arrests, both of which constitute reasonable but nonetheless serious intrusions into a person's life; some of these people have carried grudges lasting for years, and have used any excuse to harass the responsible Agent. The disclosure of an Agent's name in connection with a particular investigation, then, risks his exposure to harassment by various individuals or groups. Subsection (b)(7)(C) was used in conjunction with Subsection (b)(7)(D) to protect the identity of those who had cooperated with us and furnished us information in confidence. In some instances it was also necessary to withhold some or all of the information

furnished by a person in confidence, in order to conceal the identity of the person. If the FBI were unable to obtain information on a confidential basis from individuals and then maintain that confidence and protect the individual's identity, many individuals would refuse to furnish us information, and our investigative efforts would be severely hampered.

/s/Martin Wood
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and sworn to before me this
16th day of August, 1978.

/s/Mildred M. Foster
Notary Public

My commission expires September 14, 1981.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Burton A. Librach,)	
Plaintiff,)	
)	
v.	)	Civil Action No.
	)	78-0505-C
Federal Bureau of)	
Investigation, et al.)	
Defendants.)	

AFFIDAVIT OF SPECIAL AGENT
MARTIN WOOD

I, Martin Wood, being duly sworn, hereby
depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Branch, Records Management Division of the FBI, Washington, D.C. Due to the nature of my official duties, I am familiar with the procedures followed in processing FOIPA requests received at FBI Headquarters (FBIHQ), and specifically with the processing of plaintiff's request.

(2) This affidavit supplements my affidavit dated August 16, 1978, and is being submitted to further inform the Court concerning the FBI's handling of plaintiff's request. Set forth below is a chronological listing of correspondence between plaintiff and the FBI,

together with a brief summary of the FBI's internal actions in processing plaintiff's request. True and correct copies of all correspondence are attached hereto as separate exhibits.

(3) Plaintiff's letter of March 13, 1978, to the Office of the U.S. Attorney contained a request for documents in the possession of the FBI relating to plaintiff's prosecution in 1975, including anything concerning plaintiff contained in records that relate to the testimony and evidence presented by the Government in the prosecution of Timothy David Person (Exhibit 1). This letter was forwarded to the FBI for appropriate action.

(4) By letter dated March 29, 1978, the FBI acknowledged receipt of plaintiff's request (Exhibit 2).

(5) By letter dated April 1, 1978, plaintiff asked the FBI to comply with his request within the time allowed by Statute (Exhibit 3).

(6) By letter dated April 26, 1978, plaintiff was advised that the FBI had located documents pertaining to someone with a name similar to his, but that further processing of the request would be handled in turn with other requests in chronological order based on date of receipt (Exhibit 4).

(7) By letter dated May 5, 1978, plaintiff again requested compliance with the time limits in the statute (Exhibit 5).

(8) By letter dated June 30, 1978, the FBI made a release to the plaintiff of the non-exempt portions of materials which were responsive to plaintiff's request (Exhibit 6).

(9) By letter dated July 28, 1978, the FBI sent the plaintiff copies of documents which had previously been referred to the Department of Housing and Urban Development for consultation as to whether the documents could be released (Exhibit 7).

(10) In processing plaintiff's request, of March 13, 1978, we first determined that he was asking for (a) the file concerning his prosecution and (b) any other references to that prosecution in the files on other individuals or organizations, particularly in any file concerning Robert Fowler, Jr., or Timothy David Person. Having made that determination, we then searched the index to our central records system, for any files concerning plaintiff ("main files") or for any references to him in files about other individuals or organizations ("see references"). This search is our normal procedure for locating information in our central records system. Because of the volume of records maintained by the FBI, search of the index is the only practical method of retrieving information. As part of our usual procedure during the stage where documents are created and accumulated in our central records system, information is indexed in one of two ways. If information is placed in a main file on an individual, that entire file is indexed as pertaining to that individual. If information about one individual is placed only in a file about someone else or an organization, and if it is of any relevance or future value to the FBI, it is indexed as a see reference. This is done at the time the document is placed in a file, because otherwise there would be no practical way in the future to retrieve that information.

(11) As the Court was previously advised, at paragraphs (3) and (4) of my affidavit of August 16, 1978, our search located only one main file on the plaintiff, FBIHQ file 46-62969. This file concerns the prosecution of plaintiff and also contains information concerning other individuals. This file was processed and released to plaintiff, minus material properly exempt under the FOIA, by our letter dated June 30, 1978. Only two see references to the plaintiff could be located, and they concerned a civil rights case in which plaintiff was attorney for the victim. This file was later provided to plaintiff under the FOIA inasmuch as he was acting as attorney for the victim. Since this had nothing to do with plaintiff's prosecution, those two references were not processed as part of his request; they will be made available if plaintiff requests them.

/s/Martin Wood
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and Sworn to before me this 8th day of September, 1978.

/s/Mildred M. Foster
Notary Public

My commission expires September 14, 1981.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI

Burton A. Librach,)
Plaintiff,)
)
v.) Civil Action No.
) 78-0505
Federal Bureau of)
Investigation, et al.)
Defendants.)

A F F I D A V I T

I, Don R. Burkhalter, being duly sworn, do hereby affirm and say:

1) I am an attorney with the Executive Office for United States Attorneys, Department of Justice, Washington, D.C. My duties include the processing of Freedom of Information/Privacy Act requests submitted to the various United States Attorneys' Offices. I am familiar with the Freedom of Information/Privacy Act request of Burton A. Librach submitted to the United States Attorney's Office for the Eastern District of Missouri.

2) The Executive Office for United States Attorneys' function in processing Freedom of Information/Privacy Act requests is to act in a review capacity regarding material provided by the various United States Attorneys' offices in response to their receiving Freedom of Information/Privacy Act requests. All final responses and administrative appeals responses regarding United States Attorneys' files are generally provided by the Executive Office for the United States Attorneys.

3) This office generally does not maintain an independent system of investigative files relating to Freedom of Information/Privacy Act requesters.

4) This Office has no documents in its possession relating to Mr. Librach, except those documents accounted for in our letter to Mr. Librach dated August 23, 1978 (See Exhibit A). All records provided to this Office by the United States Attorney's Office for the Eastern District of Missouri were accounted for in the August 23, 1978 letter.

September 15, 1978
Executed

/s/ Don R. Burkhalter

Susbscribed and sworn to before me,
a Notary Public in and for the
District of Columbia on this the
13thday September, 1978.

/s/
Notary Public

My commission expires March 14, 1980.

APPENDIX F

BURTON A. LIBRACH)
Plaintiff,)
)
v.) C.A. No. 78-0505-C(2)
)
FEDERAL BUREAU OF) AFFIDAVIT
INVESTIGATION, et al.,)
Defendant.)

I, Lawrence E. Fischer, of full age,
being duly sworn to law upon my oath,
depose and say that:

1) I am Associate Legal Counsel with the
United States Marshals Service;

2) I had the responsibility of process-
ing the Freedom of Information Act request
of the plaintiff; and that on September 13,
1978, the Marshals Service by direction of
its Director, William E. Hall, released
thirteen pages of documents pertaining to
the plaintiff.

Furthermore, the Marshals Service in this
same response, withheld from the plaintiff
all documents concerning Robert Fowler, Jr.
and Timothy D. Person pursuant to exemptions
6 and 7(A)(C)(D)(E) and (F) of the Freedom
of Information Act, Title 5, Section 552b.

3) In withholding the above-mentioned
documents, the Marshals Service did not
confirm whether or not Robert Fowler, Jr.
or Timothy D. Person were in the Federal

— F-2 —

Witness Protection Program.

/s/Lawrence E. Fischer
Signature of Affiant

Subscribed and sworn to
before me, a Notary Public,
on this the 6th day of October, 1978.

/s/Sharon L. Mitchell
Notary Public

My Commission Expires April 30, 1980.

— G-1 —

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

SEP 22 1978

Mr. Burton A. Librach
8008 Carondelet Avenue, Suite 222
St. Louis, (Clayton) Missouri 63105

Dear Mr. Librach:

This is in further response to your request for access to records pursuant to the Privacy Act, and supplements our letter to you dated July 26, 1978.

The process of searching for records within the scope of your request has been completed. This search reflects the documents listed on the attached schedule which were located in systems of records exempted from the access provisions of the Privacy Act pursuant to regulations promulgated by the Attorney General and published in the Federal Register in accordance with the Act. Pursuant to Department of Justice regulation, 28 C.F.R. 16.57, however, these records have been processed under the standards of the Freedom of Information Act in an effort to ensure maximum possible disclosure. We have determined that these documents shall be made available to you and they are enclosed herewith.

In addition, we believe that the information contained in the documents listed as Items 9, 11 and 12 of the schedule warrants a note

of explanation. Item 11, which relates to Timothy David Person, lists his address as "under witness protection". The entry under the address category on this file card is in error. Our search of the Criminal Division witness security records does not reflect that Mr. Person was ever under the protection of, nor did he receive subsistence from, the Department of Justice witness protection program. The error on the file card apparently occurred when the Criminal Division received two requests for authorization to apply for grants of immunity on the same day. The first of these requests dealt with Robert Fowler, Jr., and listed his address as "under witness protection". The second request concerned Mr. Person and listed his address as "6170 Garesche, St. Louis, Missouri". However, apparently when this information was transcribed on file cards [Items 9 and 11 respectively], Mr. Person's address was incorrectly entered as "under witness protection". You will also note that Mr. Fowler's date of birth is repeated under that category on the file card [Item 11] concerning Mr. Person.

Therefore, in order to correct this error, we have canceled the original file card [see Item 11] and have issued another file card [Item 12] which accurately reflects the information contained in the immunity authorization request. The requests for authorization to apply for grants of immunity from which the information on the file cards was extracted, originated with the U.S. Attorney's Office for the Eastern District of Missouri. In accordance with Department regulations we have referred copies of those records to the Executive Office for U.S. Attorneys for consideration regarding disclosure and direct response to you.

Our search also reflects certain documents which originated with the Federal Bureau of Investigation, the U.S. Marshall's Service, and the Interstate Commerce Commission. While some of these documents may have only a peripheral relevance to your request, they have, nevertheless, been referred to the appropriate Offices for a determination regarding release and direct reply to you.

Sincerely,

ROBERT L. KEUCH
Deputy Assistant Attorney General
Criminal Division

by:/s/E. Ross Buckey
E. ROSS BUCKLEY
Freedom of Information/Privacy
Act Unit
Criminal Division

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1671

Burton A. Librach,)	
Appellant,	)	Appeal from the
	)	United States
v.	)	District Court
	)	for the Eastern
Federal Bureau of	)	District of
Investigation, et al.,	)	Missouri
Appellees.)	

Submitted: October 17, 1978

Filed: October 19, 1978

Before ROSS and McMILLIAN, Circuit Judges,
and LARSON*, Senior United States District
Judge.

PER CURIAM.

Burton Librach brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. §552, to compel production of all records concerning him held by the Federal Bureau of Investigation (FBI) and the United States Department of Justice. Although the agencies furnished most of the requested documents,¹ they deleted portions and excluded some entire pages,

*The Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

¹ Later H.U.D. responded with one document.

relying on certain disclosure exemptions set forth in 5 U.S.C. §552(b). After inspecting the documents *in camera*, the district court on September 13, 1978, summarily denied access to the deleted and withheld segments in a one paragraph order citing exemptions §552(b)(6), (7)(C) and (D).²

On appeal Librach contends that the district court failed to indicate with sufficient particularity the factual and legal bases for its ruling in favor of the agencies. He urges that as the court failed to correlate a specific statutory exemption with each portion of the records withheld and failed to set forth any reasons for sustaining the claimed exemptions, he is effectively foreclosed from challenging the district court's decision.

We agree that the record is inadequate on which to review the merits of the claimed exemptions. We therefore vacate the district court's order of September 13, 1978,

² §552(b)(6) exempts personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

§552(b)(7)(C) and (D) exempt investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation * * * confidential information furnished only by the confidential source, * * *.

and remand for more detailed determination of the exemptions applicable to the requested records.

In resisting disclosure the FBI submitted an affidavit describing in general terms the need to protect the privacy of FBI agents, informants, and other persons whose names are mentioned in the files sought by Librach. In addition, certain information furnished to the FBI in confidence was withheld in order to protect the identity of informants. While exemptions §552(b)(7)(C) and (D) contemplate nondisclosure of this kind of information, we have required the district court to determine *de novo* whether application of a claimed exemption is in fact appropriate with respect to particular materials withheld. *Cox v. United States Dept. of Justice*, 576 F.2d 1302, 1311 (8th Cir. 1978). See also, *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); *Bristol-Myers Co. v. Federal Trade Comm'n*, 424 F.2d 935, 938-39 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

The agencies bear the burden of showing that one or more of the Act's nine exemptions apply to requested material, and the exemptions are to be construed narrowly. *State of North Dakota v. Andrus*, Slip Op. No. 78-1075 (8th Cir. Aug. 9, 1978) at 4.

An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.

Id. at 7, n.7, citing *Mead Data Central, Inc. v. United States Dept. of Air Force*, 556 F.2d 242, 258 (D.C. Cir. 1977). See also, *Cox v. United States Dept. of Justice*, *supra*, 576 F.2d at 1310-12.

We note that plaintiffs in FOIA cases are at a disadvantage, suffering "the inherent handicap of not knowing the documents' exact contents and therefore being 'at a loss to argue with desirable legal precision.'" *Schwartz v. Internal Revenue Service*, 511 F.2d 1303, 1307 (D.C. Cir. 1975), citing *Vaughn v. Rosen*, *supra*, 484 F.2d at 823. In *Schwartz*, the circuit court remanded for an explicit statement by the district court of its legal basis for denying disclosure. *Schwartz v. Internal Revenue Service*, *supra*, 511 F.2d at 1307-08. We remand for similar clarification of the grounds relied upon by the district court as to each portion of the records found exempt. Because *Librach* faces a time limitation, it is necessary to expedite the proceedings on remand.

We therefore direct that on remand the district court shall, by October 31, 1978, file an order indentifying for each withheld document found exempt from disclosure: the type of document in general terms, the date and page number, the exemption the agencies claimed for the document or segment and the exemption relied upon by the district court in authorizing nondisclosure. Where possible without revealing the content of exempt material, the district court's reasoning for upholding the exemptions shall be set forth.

The agencies may file, on or before October 24, 1978, additional affidavits or other documents to aid the district court's determination.

.. Remanded for further proceedings consistent with this opinion. Mandate shall issue forthwith.

.. A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Not to be published)

.. IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BURTON A. LIBRACH,)
Plaintiff,)
v.) No. 78-505 C (2)
FEDERAL BUREAU OF)
INVESTIGATION, et al.,)
Defendants.)

ORDER

This matter is before the Court upon remand from the Court of Appeals in case number 78-1671. After reconsideration of this matter,

IT IS HEREBY ORDERED the Government's claimed exemptions on the materials submitted to this Court in camera are partially upheld and are partially denied.

For clarification this Court will refer to the documents submitted from the separate agencies one at a time. Concerning the F.B.I. material submitted to this Court, the Government has claimed two exemptions. The two exemptions claimed are Title 5, United States Code, Section 552, Subsections (b)(7)(C) and (b)(7)(D). Subsection (b)(7)(C) was used alone by the Government in an effort to withhold the names of F.B.I. Special Agents who participated in the investigation. The reasoning presented to this Court by the Government was the need to protect the Special Agents of the F.B.I. from unnecessary

.. questioning and intrusion in their private lives because some defendants have carried grudges lasting for years and have used any excuse to harrass the responsible agent.
.. This Court finds this reasoning to be a conclusory allegation of possible harm. Therefore, it is ordered that the names of the F.B.I. Agents previously deleted from the F.B.I. file provided to the plaintiff be released to the plaintiff. 1/ This Court finds that the following numbered documents contain names of F.B.I. Special Agents that shall be released to the plaintiff: 9, 11, 13-16, 18, 21, 25-26, 28, 30, 47, 49-53, 55, 66-69, 71-74, 76-77, 79-80, 82, 84, 84A, 85, 87-96, 98, 100-105, 110, 112-119, 121, 123-129, 133, 135-139, 143, 145-146, 149, 152, 154-158, 161-163, 165-169, 172-173, 176-181, 183-187, 189-192, 198. 2/

Subsection (b)(7)(C) was used by the F.B.I. to protect the privacy of other individuals who were mentioned in the file, but who were not indicted or brought to trial for the reason that such mention could be construed by members of the public as an indication that the individual was suspected of criminal activity without having been convicted beyond a reasonable doubt, thus causing an unwarranted invasion of that individual's privacy. This Court agrees with the exemptions claim under (b)(7)(C), concerning these other individuals except as to the following documents: 3/ 119, 5/3/74, A; 121, 5/3/74, P; 125, 5/3/74; 126, 5/3/74; 127, 5/3/74; 128, 5/3/74; 129, 130, 5/3/74; 134, 6/28/74, B; 135, 6/28/74, P; 138, 5/6/74; 182, 5/28/75. 4/

.. Fn. 1. The Government presented to this Court for the in camera inspection some 200 pages consisted of the F.B.I. file in this case. For purposes of clarification, this Court numbered these documents in the lower right-hand corner in the order presented by the Government.

Fn. 2. The Government has represented to this Court that if Mr. Librach or his attorneys will provide the documents that were previously released to them, it will either number the documents as the Court's copy is numbered, or it will fill in the names of the Special Agents that were deleted from the F.B.I. reports.

Fn. 3. Each document that this Court finds not to be exempt will be identified by three numbers. For example "119, 5/3/74, A" means the document at page 119 as numbered by the Court and noted in Fn. 1 above, the date at the top of the document is May 3, 1974, and the page number at the bottom of the document given to it by the FBI is page A.

Fn. 4. The Government represents to this Court that it will release the above documents to Mr. Librach or to his attorneys upon request.

This Court finds that the following listed documents or portions thereof are those claimed by the Government under exemptions (b)(7)(C) that would constitute an unwarranted invasion of privacy concerning other individuals who were investigated for suspected criminal activity: 11, 3/30/72, P; 13, 3/31/72; 15, 3/28/72; 18-20, 3/28/72;

.. 21-22, 3/27/72; 23-24, 3/27/72; 25, 3/10/72; 28-29, 1/24/72; 54, 5,6,-9, 6/21/72; 54-59, 6/21/72; 61-63, 7/21/72; 91-92, 2/13/73; 103, 7/26/73; 107-108, 8/21/73; 123, 5/3/74; 124, 5/3/74; 131, 6/21/74; 136, 5/3/74; 137, 5/6/74; 146, 7/9/74; 147, 7/9/74; 148, 7/9/74; 149-50, 7/10/74; 157,9/17/74, P; 158, 9, 8/2/74; 164, 10/15/74; 166, 10/24/74, P; 167, 10/4/74; 168, 10/23/74; 169, 10/24/74; 170, 10/21/74; 181, 5/28/75; 187-188, 11/13/75, P. This Court is in agreement with the Government's claimed exemptions on these documents for the reason that the individuals mentioned therein, were investigated for suspected criminal activity based on allegations by other persons. In no way were any of the investigated individuals found to have been involved in criminal activity. Therefore, it is this Court's decision that the release of these names or the material exempted would constitute an unwarranted invasion of that individual's privacy.

The next file presented to this Court was that from the Department of Justice. The Department of Justice file that was withheld from Mr. Librach consists of five sets of documents which again are numbered in the lower right-hand corner by this Court. The first set of documents consists of one page which is a medical file pertaining to Robert Fowler. The Government has claimed exemption (b)(6) in attempting to withhold this material. This exemption provides that disclosure would constitute a clearly unwarranted invasion of personal privacy. This Court finds that the release of this document would not constitute a clearly unwarranted invasion of personal

privacy. Therefore, it is ordered that this document be released to the requestor.

The next set of documents from the Department of Justice consists of seven pages numbered by this Court 2-8. The Government has represented that these documents consist of handwritten comments on Grand Jury testimony, and has claimed exemption (b)(3) in an effort to withhold them. This exemption provides that documents specifically exempted from disclosure by statute are to be withheld. The Government has cited to this Court Rule 6(e), Federal Rules of Criminal Procedure to support its position. This Court agrees with the exemption claimed by the Government concerning this material as Rule 6(e) provides that: "A knowing violation of rule 6 may be punished as a contempt of court." These documents are unable to be identified by date and page number as they do not contain either. These documents previously have been withheld totally and are not segregable.

The next set of documents from the Department of Justice consist of documents numbered by this Court 9-15. These documents are claimed to be exempt by the Government under exemption (b)(7)(C) for the reasons stated above concerning other individuals who are under investigations. This Court upholds these claimed exemptions for the reasons stated above concerning the documents on other individuals under investigation by the F.B.I.

The next set of documents consist of two pages numbered by this Court 16 and 17. Portions of these documents were released

to the requestor with only one name withheld in four different places. The Government claims exemption (b)(7)(C) in that the release of this name would constitute an unwarranted invasion of privacy. This Court agrees with the exemption claimed by the Government.

The final set of documents submitted by the Department of Justice consist of documents numbered by this Court 18-34. The exemption claimed by the Government is exemption (b)(3) and the statute cited by the Government is 26, USC, Section 6103, Tax Reform Act of 1976. These documents consist of the tax return of one taxpayer who is not the requestor. Therefore, this Court agrees with the exemption claimed by the Government.

The file for the U. S. Marshal's Service concerning the witness protection of Robert Fowler is not before this Court. The Government has stated that in order for these files to be produced it is necessary for the U.S. Marshal's Service to escort these documents under guard to this Court. The Government has represented that some thirteen pages were released from the U.S. Marshal's Service to Mr. Librach on September 13, 1978. The remainder of the file that was not released consists of the following:

1. 14 pages of documents relating to payments to Robert Fowler or to third persons in his behalf;
2. 5 pages of bills of lodging, inventories, and related documents pertaining to Robert Fowler's relocation;

3. 5 pages of requests for and copies of new documents provided to Robert Fowler and his new name and correspondence related thereto;
4. 3 pages of medical bills for Robert Fowler and correspondence;
5. 7 pages of correspondence between the Department of Justice officials regarding Robert Fowler and his participation in the Witness Security Program.

The Government has advanced to this Court exemptions (b) (3), (b) (7) (C), and (b) (7) (E). The statute authorizing funds for the Witness Security Program is set out as Title 28, USC, Section 524. The Government states that it feels the intent behind this statute is that the Witness Security Program by its very nature is to remain secret in order to effectuate its purposes. The Government states that its reliance on exemption (b) (7) (C) is for the reason that Robert Fowler in his testimony at trial did not state at any time where he had been relocated and, therefore, the revealing of this information would constitute an unwarranted invasion of personal privacy. The Government further relies on exemption (b) (7) (E) for the reason that a disclosure of the withheld information would make public the workings of the Witness Security Program and would hinder its further use as an effective investigative tool.

The Court agrees with the reasons advanced by the Government in an effort to withhold the material from a U.S. Marshal's Service. The very nature of the Witness

Security Program is to withhold from the public the new identity and location of the individual placed in that program. If the actual workings of that program were made public, it would most certainly be endangered. The Government like any man can only be trusted if its word is good. Protected witnesses have accepted the Government's word and trusted it that their new identities and location will not be broadcast to the world. For these reasons this Court upholds the exemptions claimed by the Government as to the material withheld by the U.S. Marshal's Service.

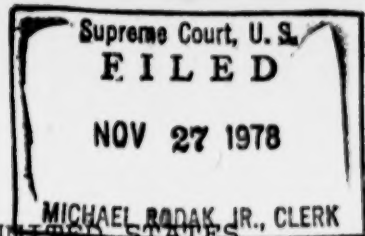
IT IS HEREBY ORDERED that the Government's exemptions are partially upheld and partially denied in accordance with this Order.

/s/ H. Kenneth Wangelin
UNITED STATES DISTRICT JUDGE

Dated this 27th day of October, 1978.

October 27, 1978

In Camera Documents examined by the Honorable H. Kenneth Wangelin on 9/12/78 and are to be kept under seal and delivered to the United States Court of Appeals for the Eighth Circuit.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-852**

BURTON A. LIBRACH,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION
WILLIAM H. WEBSTER, DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
and
GRIFFIN B. BELL, ATTORNEY GENERAL OF
THE UNITED STATES,
Respondents.

MOTION FOR EXPEDITED DECISION ON GRANTING
PETITIONER'S PETITION FOR A WRIT OF CERTIORARI;
AND FOR EXPEDITED SUBMISSION OF THE
CASE TO THE COURT

RONALD L. ROTHMAN
AND ASSOCIATES, P.C.
RONALD L. ROTHMAN
8008 Carondelet
Clayton, Missouri 63105
Attorneys for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.....

BURTON A. LIBRACH,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION
WILLIAM H. WEBSTER, DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
and
GRIFFIN B. BELL, ATTORNEY GENERAL OF
THE UNITED STATES,
Respondents.

MOTION FOR EXPEDITED DECISION ON GRANTING
PETITIONER'S PETITION FOR A WRIT OF CERTIORARI;
AND FOR EXPEDITED SUBMISSION OF THE
CASE TO THE COURT

Petitioner, Burton A. Librach,
respectfully moves this Court for an
expedited decision on granting his Petition
for A Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit, and
for an expedited submission of this case to

the Court. As a basis for this Motion, petitioner refers to his Memorandum which is attached hereto.

Respectfully submitted,

RONALD L. ROTHMAN AND
ASSOCIATES, P.C.

RONALD L. ROTHMAN

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

BURTON A. LIBRACH,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION
WILLIAM H. WEBSTER, DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
and
GRIFFIN B. BELL, ATTORNEY GENERAL OF
THE UNITED STATES,
Respondents.

MEMORANDUM IN SUPPORT OF PETITIONER'S
MOTION FOR AN EXPEDITED DECISION
GRANTING PETITIONER'S PETITION FOR A WRIT
OF CERTIORARI AND FOR EXPEDITED
SUBMISSION OF THE CASE

At the present time, petitioner has pending before the United States District Court for the Eastern District of Missouri, a Motion for a New Trial concerning his

conviction for violations of 18 U.S.C. §1001. The basis for that Motion is prosecutorial misconduct denying petitioner a fair trial in his criminal case. In essence, that Motion is the reason for this suit's existence. It was through the Freedom of Information Act that petitioner discovered seven documents of Brady and/or Jencks Act material which he requested by pre-trial motions in his criminal trial, and did not receive. Petitioner had two trials, the first being reversed for suppression of evidence both favorable and material to his defense, *U.S. v. Librach*, 520 F.2d 550 (8th Cir. 1975). Petitioner believes the failure to provide him with these seven documents exhibited in his Motion for New Trial, indicates deliberate suppression of favorable evidence in his second trial, thus warranting a new trial.

The Court of Appeals generously recognized petitioner's time problems (petitioner was required to file his Motion for New Trial by November 7) as it granted his Motion for an Expedited Hearing in that Court. Specifically, petitioner filed his Notice of Appeal on September 18, 1978 and a Motion for Expedited Hearing that same day. One week later, the Court of Appeals granted that Motion, giving petitioner until September 29, to file his brief, and allowing the government one week from that date to file its brief. The Court also granted petitioner a special hearing on the second day (October 17) of its fall term, at 8:30 a.m., ahead of the other cases on the docket for that day.

The Court of Appeals once again recognized petitioner's time limitation by

filing its opinion deciding the case on October 19. The court also stated, "[b]ecause Librach faces a time limitation, it is necessary to expedite the proceedings on remand." *Librach v. Federal Bureau of Investigation, et al.*, Slip. Op. No. 78-1671 (8th Cir. October 19, 1978) at 4. It therefore directed the District Court to file its Order complying with the Court's mandate of October 19, by October 31, 1978.

Petitioner would note that the Court of Appeals also quickly decided his Petition for a Writ of Mandamus to that Court in order for him to file this Petition for Certiorari, at the earliest practicable date. Petitioner filed that Petition with the Court on October 30, 1978. On November 1, 1978, the Court issued its mandate opening the way for this Petition to the Supreme Court.

As some of the exempted documents requested may contain further evidence supporting this Motion for New Trial, petitioner feels that a rapid decision by this Court, of whether it will grant his Petition for a Writ of Certiorari is warranted. Petitioner also believes that the public's interest in full and fair adjudication of criminal cases warrants special consideration of this case by the court. See *Cleaver v. Kelly*, 415 F.Supp. 80, 82 (D.C. D.C. 1976).

Beyond this, petitioner believes that the policy and language of the FOIA favor special consideration of this case. See specifically, 5 U.S.C. 552 (a)(4)(D) which states:

Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

While the granting of a Writ of Certiorari is discretionary with the Court, petitioner would submit that the policy of the Act would favor this Court reaching an immediate decision on whether to grant the Writ, and an expedited hearing and submission of the case should the court decide to grant the Writ.

In the event the Court decides to grant the petition for Certiorari, petitioner has attached hereto, a suggested briefing schedule for the Court's consideration. Petitioner believes that the facts surrounding this case and the clear policy of the FOIA warrant an expeditious handling of this case. He therefore respectfully request the Court to make a speedy decision concerning the granting of Petitioner's Petition for a Writ of Certiorari and an expedited hearing and submission of the case to the Court should it decide to grant the Writ.

Respectfully submitted,

RONALD L. ROTHMAN AND
ASSOCIATES, P.C.

RONALD L. ROTHMAN

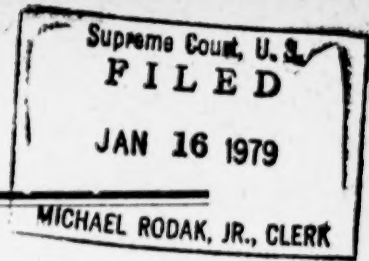
PETITIONER'S SUGGESTED BRIEFING SCHEDULE

Petitioner's brief one week from the date of the Court's mandate granting the Petition for Certiorari.

Respondent's brief one week after the date petitioner files his brief in the Court.

Petitioner respectfully requests that this matter be placed on the Court's calendar for oral argument at the earliest date convenient and practicable, consistent with the Docket of the Court.

No. 78-852



In the Supreme Court of the United States

OCTOBER TERM, 1978

BURTON A. LIBRACH, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-852

BURTON A. LIBRACH, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

1. Petitioner was convicted in 1975 of filing a false claim to obtain money from the government, in violation of 18 U.S.C. 1001. *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975); 536 F.2d 1228 (8th Cir. 1976). He filed a request under the Freedom of Information Act, 5 U.S.C. 552, seeking copies of documents that could be used in support of a motion for a new trial. Three separate files concerning petitioner were located within the Depart-

ment of Justice: an FBI file, the Department file (i.e., the U.S. Attorney's records), and a file from the U.S. Marshals Service. The first two were disclosed to petitioner with only minor deletions, and the third was disclosed in substantial part.

Petitioner filed suit challenging the deletions. After inspecting the affidavits *in camera*, the district court upheld the government's claims of exemption from mandatory disclosure on September 13, 1978 (Pet. App. B-1). The court of appeals vacated the order and remanded the case on October 19, 1978, with instructions that the district court file a detailed opinion indicating the exemption relied upon and the reasoning used for each of the deletions made by the government (Pet. App. H-1 to H-5). On October 27, 1978, the district court filed an opinion describing in detail each of the claims of exemption it had upheld (Pet. App. I-1 to I-8). Petitioner then sought mandamus from the court of appeals, asserting that the district court had not complied with the court of appeals' mandate. The court of appeals denied the petition in an opinion upholding each of the district court's findings on remand (Pet. App. A-1 to A-3).¹

2. The petition seeking review of the court of appeals' denial of mandamus presents no issue of general importance. The deletions made in the FBI

¹ The appeal, remand, and petition for mandamus proceeded on an expedited basis, since petitioner was under a deadline for filing his motion for a new trial in his criminal case. That motion was filed on November 6, 1978, and was denied on December 20, 1978. *United States v. Librach*, No. 74-199 CR (3) (E.D. Mo.).

file consist entirely of the names of three types of persons: FBI agents who worked on the case, confidential informants, and persons mentioned in the file but never indicted or tried. In affidavits (Pet. App. C-1 to D-4) an FBI official explained that the agents' names were withheld on privacy grounds, under 5 U.S.C. 552(b)(7)(C), because disclosure would expose the agents to harassment by persons who may hold grudges against them. The same exemption was cited in support of withholding the names of unindicted persons identified in the file, to avoid creating the public impression that those persons were once suspected of criminal activity. Confidential informants are protected by 5 U.S.C. 552(b)(7)(D). These claims were fully supported by detailed public affidavits and were entirely proper. The court below thus was correct in upholding the claims.

Although deletions in the other two files (those of the Department of Justice and the Marshals Service) were not supported by detailed affidavits, the courts below nevertheless were correct in upholding the claims of exemption. The district court's opinion on remand presents petitioner with a more than adequate specification of the exemptions claimed for each deleted portion of these two files (Pet. App. I-4 to I-8). The following items were deleted from the Department of Justice file: a medical report that the district court ordered be disclosed and which, to our knowledge, was disclosed; handwritten notes on grand jury testimony, which were withheld under 5 U.S.C. 552(b)(3) and Fed. R. Crim. P. 6(e);

names of persons not indicted or tried, which were withheld for the same reason as names in the FBI file; and a tax return withheld under 5 U.S.C. 552 (b) (3) and 26 U.S.C. 6103. The materials withheld from the Marshals Service file all concern the procedures used to place Robert Fowler, the chief witness against petitioner at his criminal trial, in the Witness Security Program. Fowler was given protective custody and a new identity after threats were made against his life. Details of his participation in the program were withheld to protect Fowler and to protect the Witness Security Program. All of these claims of exemption were fully described by the district court. Petitioner is thus fully aware of the basis claimed for exemption of each item that has been withheld and was fully able to challenge each holding.

3. Petitioner presents several other arguments, each of which is insubstantial. First, he complains that there are other documents in the Department of Justice file that have not been identified, but the district court found to the contrary in August. Petitioner did not then and has not now made specific charges that any heretofore unidentified documents in this file might exist, and the government has denied that they do exist.

Second, although the FOIA exemptions do not justify withholding material that must be disclosed under the Jencks Act, 18 U.S.C. 3500, and *Brady v. Maryland*, 373 U.S. 83 (1963), it does not follow, as petitioner argues (Pet. 15-16), that the FOIA is the

proper vehicle for obtaining Jencks Act and *Brady* material. The district court, responding to a motion for a new trial, might order disclosure of any such material that exists, but the court in an FOIA case has neither the jurisdiction nor the familiarity with petitioner's criminal case to order disclosure under *Brady* or the Jencks Act.²

Finally, the government did not waive its claims of exemption by failing to plead them as affirmative defenses in its answer. The government pleaded its defenses in the most complete form possible at the time of the answer, by stating that it had not yet located the requested records or reviewed them to determine which exemptions, if any, would be claimed. As soon as specific claims of exemption were decided on, the government notified petitioner. At no time was petitioner misled or surprised to learn that claims of exemption would be made.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

² Although the district court denied petitioner's motion for a new trial (see note 1, *supra*), petitioner may raise any properly preserved claim of error on appeal. It is not clear from the materials in this case whether petitioner sought disclosure pursuant to his new trial motion.